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WHAT MAKES A GOOD APPOINTIVE SYSTEM FOR THE SELECTION OF STATE COURT JUDGES: THE VISION OF THE SYMPOSIUM

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Cover Page Footnote

Norman L. Greene, 2007. Columbia College (A.B.); New York University School of Law (J.D.). Member of the firm of Schoeman Updike & Kaufman, LLP, New York, N.Y. Mr. Greene has published various articles on judicial selection which are cited throughout this Article. His work also includes published symposia on other aspects of the judiciary organized at the Association of the Bar of the City of New York, each of which is accompanied by his preface or introduction, as follows: Norman L. Greene, Introductory Remarks, Politicians on Judges: Fair Criticism or Intimidation, 72 N.Y.U. L. REV. 294 (1997) (exploring the distinction between responsibly criticizing judges and criticizing them in order to intimidate them so as to achieve specific results in particular cases); Norman L. Greene, Preface, Executioners, Jailers, Slave-Trappers and the Law: What Role Should Morality Play in Judging?, 19 CARDOZO L. REV. 963 (1997) (judges deciding against conscience); Norman L. Greene, A Perspective on "Nazis in the Courtroom, Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France," 61 BROOK. L. REV. 1122 (1996) (judges and other lawyers complicit with fascism). The author acknowledges the support of Altria Group, Inc. in connection with the preparation of this article, the accompanying model legislation, and associated explanation for the legislation in this symposium issue

WHAT MAKES A GOOD APPOINTIVE SYSTEM FOR THE SELECTION OF STATE COURT JUDGES: THE VISION OF THE SYMPOSIUM

*Norman L. Greene**

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Pessimists about the benefits and chances of reform can be found everywhere. In my view, whatever we believe about any particular system, we should all approach our democracy as reformers and agents for change, especially lawyers, who take an oath to uphold and improve the law. While some sit back and praise what we all believe to be the greatest government in the world, others . . . continually focus on not what our democracy is, but what it should be.¹

I. THE VISION OF THE SYMPOSIUM

A. Introduction

What makes a good commission-based appointment system for the selection of state court judges?² This is an important question because the models proposed by reformers and adopted by the states should be the best available. Through the presentations at Fordham Law School on April 7, 2006 and the articles in this book, the symposium sought to guide the reform of judicial selection systems by identifying the best approaches to appointing judges, existing or proposed.³ To paraphrase the introduction to this Article,

1. John D. Feerick, *Why We Seek Reform*, 34 FORDHAM URB. L.J. 3, 7 (2007). The symposium was also described in Thomas F. Whelan, *Symposium on the Best Appointive System for the Selection of State Court Judges*, SUFFOLK LAW., Apr. 2006, at 24. Justice Whelan is a Supreme Court Justice in Suffolk County, New York, and attended the symposium.

2. This Article uses the term “commission-based” to describe the appointive system where a commission provides a limited number of names from which an appointing authority must select.

3. See Steven Zeidman, *Careful What You Wish For: Tough Questions, Honest Answers, and Innovative Approaches to Appointive Judicial Selection*, 34 FORDHAM URB. L.J. 473, 475 (2007) [hereinafter Zeidman, *Careful What You Wish For*] (“This symposium invited the participants to move beyond the standard ‘election versus appointment’ debate. Instead, all were urged to ‘critically appraise’ appointive selection—what exactly are the component parts of a gold standard appointive system?”).

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the symposium approached the subject as an agent for change.⁴ The subject is multi-disciplinary, so the symposium included a number of panelists who are political scientists as well as lawyers, law professors, and judges; because the subject involved various states, the twenty participants came from fifteen different ones.

This Article will proceed in two parts. First, it will set forth the context of the symposium, including reflections on how judges are being selected now through the elective process, the need for a better approach to judicial selection, and the particular climate in New York at the time of the symposium and thereafter. The New York discussion will focus on the district court and Second Circuit decisions in *Lopez Torres v. New York State Board of Elections*, which exposed and struck down as unconstitutional New York's scheme for selecting certain trial court judges, under which political party leaders dictated judicial selection.⁵ Second, it will review the principal topics and themes of the symposium, including highlights of the presentations and articles of the participants on how a well-constructed judicial appointment system should be designed. To quote one of the symposium's panelists, "Embracing a judicial nominating commission scheme is not enough. Choosing the appropriate paradigm is paramount."⁶

B. The Context

1. Concerns About Elections

Reformers have long proposed the use of commission-based appointive systems as a cure for judicial selection problems, principally but not exclusively with elections.⁷ These problems include improper incentives for elected judges to decide what might be popular rather than decide the case upon the basis of the law and the facts, and the ills of costly, nasty election campaigns.⁸ To the

4. Feerick, *supra* note 1, at 7.

5. 411 F. Supp. 2d 212 (E.D.N.Y.), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). The Supreme Court granted review of *Lopez Torres* as this Article was going to print.

6. Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 83 (2007).

7. See, e.g., Norman L. Greene, *The Governor's Power to Appoint Judges: New York Should Have the Best Available Appointment System*, 7 N.Y. ST. B.A. GOV'T L. & POL'Y J. 46, 46 n.7 (2005) [hereinafter Greene, *Governor's Power*] (listing organizations supporting independent judicial nominating commissions).

8. See COMMISSION ON THE 21ST CENTURY JUDICIARY, A.B.A., JUSTICE IN JEOPARDY 1, 19 (2003) [hereinafter JUSTICE IN JEOPARDY] ("[I]t is incumbents who are put at future risk of losing their tenure when they uphold unpopular laws, invalidate popular laws, or protect the rights of unpopular litigants. In such cases, it is incum-

extent that the public believes the negative things judicial candidates say about each other while campaigning, this harms the justice system by undermining trust in the judiciary.⁹ Also, the need to raise campaign funds, among other things, threatens the appearance (or fact) of impartiality. There have also been sham political boss-controlled elevations of party favorites, where party loyalty or service (past or anticipated), rather than competence or temperament, are at issue.¹⁰ “Political party leaders see the judiciary as a way to promote and reward political party involvement.”¹¹ Com-

bents who are thus presented with the impossible choice of sacrificing either their careers or their independence and the rule of law.”); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 816 (1995); see also Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 45 (2003) (“A judge may make eminently correct evidentiary rulings only to be slandered by an opponent for protecting criminals or letting them out on technicalities.”); Ann Woolner, *Ask No Promises of These Political Candidates*, BLOOMBERG.COM, Sept. 1, 2006, http://www.bloomberg.com/apps/news?pid=email_en&refer=home&sid=avGtpem_bVR4 (“For elected judges to keep their jobs, they need to keep one eye on the law and the other on public opinion.”).

Other problems with elections include poorly informed voters. See Stempel, *supra*, at 51 (“[J]udicial elections . . . force even our most conscientious voters to simply pull voting booth levers at random or based on the most recent political sign viewed.”); see also *id.* at 46 (“[M]ost voters participating in local judicial elections are largely shooting in the dark in casting their ballots.”). Election campaigns by incumbent judges also divert time and effort from the business of the court.

9. R. William Ide, a former president of the American Bar Association, explained to me how he came to oppose judicial elections. He stated that it was in part a matter of professionalism, public trust, and the image of judges. He noted that when judicial candidates ran negative campaigns, the public was likely to believe the negative images, and their trust in judges declined significantly to the detriment of the justice system. E-mail from R. William Ide to author (Aug. 14, 2006, 09:39 EDT) (on file with Fordham Urban Law Journal); see also Mark I. Harrison et al., *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 254 (2007) (“[C]andidates attack each other using soundbites or give the voters biased, laudatory self-assessments. Elections rarely offer objective information, and certainly nothing that is actually tracked and quantified”); Editorial, *Judicial Politics Run Amok*, N.Y. TIMES, Sept. 19, 2006, at A24 (arguing that unfair or misleading attack ads result in “diminished public respect and confidence in judicial decision making no matter which candidates win”); Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*, LEGAL TIMES, Aug. 23, 2006, available at <http://www.law.com/jsp/article.jsp?id=1156248911451> (quoting Indiana Supreme Court Chief Justice Randall Shepard: “No good comes from fostering judicial food fights at the ballot box”) (internal quotations omitted).

10. See *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y.), *aff’d*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). See generally *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, in GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENTAL INTEGRITY 270 (Bruce A. Green ed., 1991) [hereinafter *Becoming a Judge*].

11. Feerick, *supra* note 1, at 7.

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mission-based appointment systems are also recommended to replace systems where judges are appointed without commissions.¹²

Some “reform” politicians contend that they use “independent” screening panels before selecting party favorites as nominees in an elective process in an attempt to seek judicial quality.¹³ These panels should not be confused with judicial nominating commissions. Political screening panels by their very nature can be unreliable guardians against the unqualified, bad-tempered, and otherwise ill-suited candidates for judicial office.¹⁴ For example,

12. See generally *infra* Section II.A; Greene, *Governor's Power*, *supra* note 7 (recommending the use of a commission-based appointment system for New York's intermediate appellate court instead of the current system in which the governor designates appellate court choices from the ranks of trial court judges without using a judicial nominating commission). Where judges are appointed without commissions, one danger, among others, is that there are no structural restraints on the appointing authority's use of judgeships to reward political service as opposed to ability, even where screening panels are used.

13. For a discussion of such political screening panels, see *Report of the Task Force on Judicial Selection of the Association of the Bar of the City of New York, Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York*, 58 REC. 374, 388 (2003) [hereinafter *Task Force Recommendations*]. Among other things, at the time of the Task Force Recommendations, the screening panel in Brooklyn, New York was described as having “few objective guidelines and procedures, and appears to be subject to extensive influence from the party leader.” *Id.* at 389-90. For recent New York County proposed reforms, see Daniel Wise, *Plan to Reform Screening Panels Gets High Marks*, N.Y.L.J., Jan. 27, 2006, at 1; Press Release, The Fund for Modern Courts, Modern Courts Hails Reform Plan for Selecting Judges in New York State (Jan. 10, 2006), available at http://www.moderncourts.org/News/pr_1_10_06.html. Whether or not reforms have been put in place that remedy the objections set forth in the Task Force Recommendations or elsewhere is beyond the scope of this Article. Based on the decision in *Lopez Torres*, party leadership evidently controlled New York's state judicial selection apparatus, at least at the Supreme Court level, regardless of screening. The Association of the Bar of the City of New York is also known as the New York City Bar Association.

14. These comments on panels are not meant to address bar association screening of judicial candidates, which functions outside the political process, performs a supplemental function during the judicial selection process, and may address both appointed and elected judicial candidates. For the New York City Bar Association's establishment of its Committee on the Judiciary, see By-Laws of the New York City Bar Association § XVII, ¶ 2, available at <http://www.nycbar.org/AssociationGovernance/bylaws.htm> (last visited Mar. 29, 2007) (“The Committee shall endeavor to secure the nomination, election, certification, or appointment of qualified candidates, to prevent the nomination, election, certification, or appointment of unqualified candidates, and to prevent political considerations from outweighing fitness in the selection of candidates for judicial office . . .”).

Bar association screening is voluntary, however, and candidates may decline to participate; disapproved candidates for elected judgeships may still run for office and prevail despite their disapproval, and disapproved candidates may be appointed to judgeships unless the appointing authority declines to do so. Furthermore, bar association screeners are unlikely to have access to the same array of information as would be provided by established judicial performance evaluation programs, such as in Ari-

such screening panels, lacking official sanction or sponsorship, are not subject to published and enforceable rules and regulations.¹⁵ They need not hold public hearings or even operate openly. The public has no enforceable right to bring the unqualified to the attention of these committees, no right to appear before the committees to make their position known personally, and no right to know even when or where the committees meet so as to be able to bring forward information.

Nor is the thoroughness of the investigation by these panels known, let alone whether the investigators are trained in the process.¹⁶ The public is not permitted to respond to the judge who is interviewed before the committee, who answers pleasantly for the short period of time of the interview (as virtually anyone can) to dispel any concerns of the committee, and who dismisses the unfavorable comments gathered by the committee as those of disgruntled litigants. All of these issues may be addressed in a well-designed appointive system.

zona or Colorado. These programs are discussed by panelists Mark Harrison and Jean Dubofsky in their articles in this symposium issue.

15. More promising than political screening panels may be the Independent Judicial Election Qualification Commissions to be set up in New York. These commissions were established by Part 150 of the Rules of the Chief Administrative Judge of the State of New York, *available at* <http://www.courts.state.ny.us/rules/chiefadmin/150.shtml> (last visited Feb. 11, 2007). As noted in the preamble to Part 150:

[T]he public frequently is unaware of the qualifications of candidates who run for judicial office, because the candidate-designation process often is not conducted in public view. The public will have greater confidence in the judicial election process if they know that judicial candidates were screened by independent screening panels and found to possess the qualities necessary for effective judicial performance.

Id. Independent, state-sponsored screening commissions were also recommended by the Commission to Promote Public Confidence in Judicial Elections, popularly known as the “Feerick Commission.” See COMM’N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 17-22 (June 2004), *available at* <http://law.fordham.edu/commission/judicialelections/main.ihtml> [hereinafter FEERICK COMMISSION REPORT]. The preamble’s statement regarding the secrecy of the candidate designation process pre-dated the Second Circuit’s decision in *Lopez Torres*, which struck down a secretive process by party leaders for selecting certain New York trial judges through a convention system. See *generally* 411 F. Supp. 2d 212. Part 150 commissions, while promising, do not prevent the unqualified from running in and even winning judicial elections.

16. These political screening committees lack a potent source of information on judicial performance, unlike Arizona and Colorado, which provide judicial performance evaluations. Even if the political screening committees might be otherwise well-intentioned, the lack of useful information would necessarily hamper their performance.

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The best permanent solution . . . would be a merit-based appointment system that puts qualifications ahead of political connections. . . . The current system of choosing judges through secret deals and old-fashioned cronyism corrodes the integrity of the legal system and diminishes the courts.¹⁷

Nationally, the 2002 Supreme Court decision in *Republican Party of Minnesota v. White*¹⁸ and ensuing decisions raised new concerns over how judges are selected by expanding the permissible campaign conduct of judicial candidates.¹⁹ As the Chief Justice of the Minnesota Supreme Court recently observed, under *White*, “[j]udicial candidates can now . . . announce their personal views on disputed political, social and legal issues and, with some limits, personally solicit contributions for their campaigns.”²⁰ In her concurring opinion in *White*, Justice Sandra Day O’Connor noted that if the states were unhappy with the implications of *White*, they need not elect their judges.²¹ While the *White* case was already generating discussion of judicial selection reform, another decision issued just a few months before this symposium intensified the dialogue and gave the symposium a special context.

In January 2006, a federal district court in New York issued a decision in *Lopez Torres v. New York State Board of Elections*, which the Second Circuit Court of Appeals affirmed in August 2006. The court preliminarily enjoined New York’s convention system for the selection of party nominees to be trial court judges

17. Editorial, *Breaking Down the Clubhouse*, N.Y. TIMES, Sept. 9, 2006, at A14 [hereinafter *Breaking Down the Clubhouse*] (commenting on the Second Circuit’s decision in *Lopez Torres*).

18. 536 U.S. 765, 788 (2002).

19. See Rachel Paine Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 625 (2005) [hereinafter Caufield, *In the Wake of White*] (“[T]he U.S. Supreme Court fundamentally altered the landscape of state judicial elections.”).

20. Russell A. Anderson, *The State of the Judiciary*, BENCH & B. MINN., Aug. 2006, at 20, 22; see also Editorial, *Judicial Politics Run Amok*, *supra* note 9 (“Recent court decisions have loosened restrictions on judicial campaigning without taking adequate care to delineate reasonable ethical boundaries needed to preserve public trust and the court’s special role as a neutral arbiter.”).

21. See *White*, 536 U.S. at 792 (O’Connor, J., concurring) (“If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”).

known as “Supreme Court justices.”²² Unlike judges in any other state, New York’s trial judges, designated “Supreme Court justices,”²³ were nominated through a convention process, not through partisan primaries or other means.²⁴ At the convention, delegates selected the party’s nominees for judgeships, and these nominees appeared on the general election ballot.²⁵ The Second Circuit began its decision and framed the issue, stating “[t]his case requires us to peer inside New York State’s political clubhouses and determine whether party leaders have arrogated to themselves

22. See *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 214 (E.D.N.Y.), *aff’d*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). The Supreme Court granted review of *Lopez Torres* as this Article was going to print. See also Tom Perrotta, *State Scheme to Select Judges Found to Violate Voter Rights*, N.Y.L.J., Jan. 30, 2006, at 1.

23. The Second Circuit referred to New York’s use of the name “Supreme Court” for its general jurisdiction trial court as “peculiar terminology,” since in every other state that “might signify a member of the highest appellate court.” *Lopez Torres*, 462 F.3d at 171. Only New York’s Supreme Court justices are eligible to be appointed to New York’s intermediate appellate court known as the Appellate Division. N.Y. CONST. art. VI, § 4(c); see also Greene, *Governor’s Power*, *supra* note 7, at 46. Control over the selection of Supreme Court justices therefore provides the party leadership with indirect control over the selection of the membership of the Appellate Division.

24. *Lopez Torres*, 462 F.3d at 172; see also *Lopez Torres*, 411 F. Supp. 2d at 215 (“New York is unique in its use of a convention system to select nominees to its trial court of general jurisdiction” and “[t]he convention system at the heart of this case . . . distinguishes New York from every other state . . .”); *Lopez Torres*, 411 F. Supp. 2d at 216 (“All other elected judges in New York State are nominated in a direct primary election rather than in a judicial convention.”). Although concerns have been raised since *Lopez Torres* about the use of direct primaries for nominating candidates for New York’s Supreme Court, the district court noted that the use of conventions, not primaries, is what is exceptional in New York’s judicial selection scheme. *Lopez Torres*, 411 F. Supp. 2d at 216. Moreover, even where primaries have been available, such as for the New York City Civil Court, some candidates have still run unopposed. *Lopez Torres* did not address the role of political party leadership in the selection of other judgeships in New York, because that was not the subject of the action. Party control, however, may extend in one form or another to those judgeships as well. See *Becoming a Judge*, *supra* note 10, at 276 (focusing on Queens County and noting that the “Democratic county leader in Queens . . . and important district leaders . . . control access to positions on both the Supreme Court and the Civil Court”).

In his amicus brief, filed in the Second Circuit in *Lopez Torres*, former New York City Mayor Edward Koch supported the use of primaries for the nomination of Supreme Court justices as an interim remedy. See Brief for Edward I. Koch as Amicus Curiae Supporting Appellees at 13-14, *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006) (No. 06-0635) [hereinafter Koch Amicus Brief] (“The parade of horrors appellants attribute to a primary system is ridiculous. While I believe that an appointive system using independent screening panels is the best way to select all judges, there is nothing ‘undignified’ about elections, primary or general . . . Using them temporarily, until the legislature or the people find what they deem to be the optimum solution, is appropriate.”).

25. *Lopez Torres*, 462 F.3d at 172.

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a choice that belongs to the people.”²⁶ The Second Circuit found that nomination in New York is typically tantamount to election, and the New York nomination process is controlled by political party leadership.²⁷ The Second Circuit found, among other things, that “[t]hrough a byzantine and onerous network of nominating phase regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment [by political party leadership].”²⁸

The court concluded that the lead plaintiff’s frustration by county party leadership for nomination to a trial court judgeship was not an “anomalous political mugging.”²⁹ “[O]ne-party rule is the norm in most judicial districts,” and “the general election [for

26. *Id.* at 169.

27. *See id.* at 181 (citing a task force report noting that “[i]n practice it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election” and “[a]s we all know . . . our system is only nominally one of election”) (internal quotations omitted). The Second Circuit cited other supportive statements from commission reports, task forces, and newspaper editorials, recognizing the control of political party leadership over the judicial selection process. *See id.* at 199 (citing a commission finding that “across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders”); *see also Becoming a Judge, supra* note 10, at 277 (“Political party control over judicial elections is most clearly revealed at the Supreme Court nominating convention. The convention . . . really operates as a rubber stamp of the county leader.”) (internal quotations omitted).

Even before *Lopez Torres*, in testimony before the Commission to Promote Public Confidence in Judicial Elections (popularly known as “the Feerick Commission”), New York City Mayor Michael Bloomberg stated: “[P]arty judicial conventions, where Supreme Court nominees are selected, are completely shrouded in secrecy with absolutely no input from the electorate [T]he local clubhouse . . . should not be a prerequisite for becoming a judge . . . and justice is much too important to be left to the politicians.” *See* Press Release, The City of New York, Office of the Mayor, Mayor Michael R. Bloomberg Delivers Testimony Before The Commission to Promote Public Confidence in Judicial Elections (Sept. 16, 2003), *available at* <http://www.nyc.gov/html/law/downloads/pdf/pr091603.pdf>.

Kings County District Attorney Charles J. Hynes, in an amicus brief filed in the Second Circuit in *Lopez Torres*, contended that “the principal function” of the judicial conventions is to “give the deceptive appearance of legitimacy to the unilateral prior determinations of Party leaders concerning who will fill an open seat on the bench of the Supreme Court.” Brief for Charles J. Hynes as Amicus Curiae Supporting Appellees at 12, *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006) (No. 06-0635). Former Mayor Koch, in his amicus brief, commented that the “convention system of Supreme Court Justices [is] but ‘a show of democracy’ where ‘county leaders bargain with each other before they alone decide where the judge-ships will go.’” Koch Amicus Brief, *supra* note 24, at 2-3 (citing MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR . . . : POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE* 136 (Vintage 1972)).

28. *Lopez Torres*, 462 F.3d at 200.

29. *Id.* at 181.

the trial court judgeships] is little more than ceremony”³⁰; a county party leader admitted saying that he “‘surely’ can ‘kill’ any nomination and delegates [would] not “want[] to get me angry, so they will not go against me until they have nothing to lose.”³¹ “[N]o one wants to upset the county leader” since that “would jeopardize one’s political future.”³² Since politics drove the process, some candidates advanced to nomination in part because their husbands were district political party leaders.³³ A known “‘horrible’ choice—unqualified and temperamentally unfit for the bench,” was not opposed at a convention for fear of offending the political leader who desired the candidate.³⁴ In the case of the lead plaintiff, the party leaders refused to support her nomination for a Supreme Court judgeship because she refused to hire the leader’s favored candidate for an important position as her law secretary while she served as a Civil Court judge.³⁵ Such political domination of the process was all too common.

30. *Id.* at 178.

31. *Id.* at 198.

32. *Id.* at 199.

33. *Id.* at 200.

34. *Id.* at 178. The finding that the party put a known ill-tempered candidate on the bench for political reasons should not pass unnoticed. Anointing such a candidate or reselecting an ill-tempered incumbent are gross abuses of the public trust which may be addressed administratively through the appropriate office of court administration, administrative judge, or commission on judicial conduct. See generally Norman L. Greene, *A Perspective on Temper in the Court: A Forum on Judicial Civility*, 23 FORDHAM URB. L.J. 709 (1996); Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125 (2007); Daniel Wise, *Lawyers Discuss What to Do About Rudeness of Judges*, N.Y.L.J., Oct. 30, 1995, at 1. At this symposium, Nebraska Court of Appeals Judge John Irwin considered the importance of judicial temperament for Nebraska’s performance review process for judges. He said that “judges ‘can be dumb as a bucket of hair’ but if they are nice to people in court,” they will be approved. Whelan, *supra* note 1, at 24. A good example of judicial intemperance appears in Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, at 31 (quoting an attorney: “[w]hen [the judge is] mad, first his face gets red Then his neck gets red and he starts tucking his chin down into his chest. If he tears off his glasses, I don’t care what side you’re on, you had better drop to the floor and get under that table fast”).

35. *Lopez Torres*, 462 F.3d at 178-79. The plaintiff had interviewed the party-favored candidate for a position as a law secretary, but she was told by the applicant’s prior employer that his work was “‘mediocre’ and that ‘he had spent an enormous amount of time on the phone doing political work.’” *Id.* at 179. Although party leadership had a practice of using the position of law secretary as a way to reward political service, the Second Circuit found that “the position of a law secretary is a significant one” with important tasks to perform, including legal research, assisting in drafting opinions and orders, and holding conferences with attorneys. *Id.* at 178.

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The district court's decision was recognized as having an "incredible impact"³⁶ and having "shook the judiciary," and sparked extensive controversy and analysis. This included renewed calls for and efforts at reform from bar leadership³⁷ and the press.³⁸ The *New York Times* stated that "[t]he myth that New Yorkers choose their top trial judges by democratic election was exploded last week by a 77-page federal court decision striking down the clubhouse-controlled selection process for violating the rights of candidates and voters."³⁹ The *Times* called the stricken convention system "hack-infested" and stated that it was "undermining the quality of the state's judiciary"; it added that "clubhouse politicians award positions on the state's top trial bench as if they were low-level patronage jobs."⁴⁰ After the Second Circuit's decision, a

36. Feerick, *supra* note 1, at 11.

37. The New York County Lawyers' Association (NYCLA) devoted the lead story in its March 2006 newsletter *New York County Lawyer* to the *Lopez Torres* case. See *10 Days that Shook the Judiciary*, N.Y. COUNTY LAW., Mar. 2006, at 1, available at http://www.nycla.org/siteFiles/Publications/Publications224_0.pdf [hereinafter *10 Days*]. The title is dramatic but fair. NYCLA's then-president Norman L. Reimer urged "New York's lawyers and judges" not to "squander this chance to shape the contours of reform." Norman L. Reimer, *Judicial Selection: Crisis and Opportunity*, N.Y. COUNTY LAW., Mar. 2006, at 5. According to Mr. Reimer, "[c]ircumstances have combined to present a rare opportunity for meaningful reform. We should not flinch or finesse nor allow a banal absorption with the status quo to impede our will to lead." *Id.* Mr. Reimer "reaffirmed NYCLA's long standing support for a merit-based appointment system." *10 Days, supra*, at 17. Consistent with this symposium, Mr. Reimer also recommended considering "an optimum appointive system," taking account of "national experience." Reimer, *supra*, at 5; see also N.Y. COUNTY LAWYERS' ASS'N, JUDICIAL SELECTION IN NEW YORK STATE: A ROADMAP TO REFORM (May 8, 2006), available at http://www.nycla.org/siteFiles/Publications/Publications248_0.pdf [hereinafter *ROADMAP TO REFORM*]. "While the bar has many worthwhile causes to promote, in the years to come, can there be any more important cause to include among them than judicial selection reform?" Feerick, *supra* note 1, at 12.

38. The *New York Daily News*, in an editorial following the Second Circuit oral argument but before the decision in *Lopez Torres*, wrote that "the bosses exert dictatorial control over who gets on the bench in New York through their rigged judicial nominating conventions. In this matter, boss rule is absolute" Editorial, *The Party's Over for Dictator Bosses*, N.Y. DAILY NEWS, June 8, 2006, at 40. The *New York Post* called the District Court's decision "scathing" and a "stunning victory [for] reformers" and referred to the judicial selection process for New York's Supreme Court justices as "tainted with cronyism and corruption" and "sham." David Seifman & Zach Haberman, *Party's Over for Rigged Judge Elex*, N.Y. POST, Jan. 28, 2006, at 2.

39. Editorial, *A Turning Point for New York Courts*, N.Y. TIMES, Feb. 4, 2006, at A12 [hereinafter *Turning Point*].

40. *Id.* Indeed, using judgeships as a reward for political service is a poor use of these offices. The states require judges of high quality, and political services have nothing whatsoever to do with that calculus. See *Becoming a Judge, supra* note 10, at 293 ("As our investigation shows, political parties are geared to reward loyalty, not merit; to discourage, not encourage, independence and diversity; and to obtain power rather than promote justice. Such goals, however valuable to the operation of the

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Times editorial added: “Judges ascend to the bench as a result of loyal work for the party or friendship with a political power broker . . . [They] are chosen at judicial conventions whose delegates are generally handpicked by party bosses . . . [in a] backroom process [] fueled by political quid pro quos.”⁴¹ The *Times* called for appointment rather than election of judges.⁴²

Although the decision in *Lopez Torres* was a bellwether event that should engender important reform, commentators have had different views on the reforms they seek for addressing the problems identified by the Second Circuit.⁴³ The *Times* cautioned

party system in general, have no place in the selection of our judges.”); see also Seifman & Haberman, *supra* note 38 (quoting a political consultant: “Supreme Court justice is the highest position that political leaders in many areas have almost unlimited power to bestow on people . . . Now, that’s gone”). There is an analogue in the 19th century for what has transpired in New York. See Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 466 (1993) (“The innovation of electing judges soon proved to contain its share of problems. Political machines began to control the selection of judges through the nomination process, and elections became rubber stamps of the machine’s selections. This led to the creation of a politically responsive, yet at times incompetent, judiciary.”) (citations omitted).

41. *Breaking Down the Clubhouse*, *supra* note 17.

42. The *New York Times* noted that judicial elections should be scrapped “in favor of a new merit selection system for the Supreme Court.” *Turning Point*, *supra* note 39. The *New York Daily News* has likewise endorsed appointive selection. See Richard Schwartz, *Chief Judge’s Reform Efforts Just Go Bust*, N.Y. DAILY NEWS, Dec. 9, 2003, at 41 (describing the “best solution—merit appointment of judges by the governor with the state Legislature’s approval”).

43. See Daniel Wise, *Second Circuit Rejects Judicial Conventions*, N.Y.L.J., Aug. 31, 2006, at 1 [hereinafter Wise, *Second Circuit*] (describing the various viewpoints of The Fund for Modern Courts, the Brooklyn District Attorney, and the New York State Bar Association, including the Fund chairperson’s suggestion that conventions be improved, the District Attorney’s position that the convention system be abolished, and the New York State Bar Association president’s statement “‘let’s implement real reform, and merit selection is real reform’”); see also E-mail from James Sample, Associate Counsel, Brennan Center for Justice, to author (Sept. 10, 2006, 11:48 EDT) (on file with Fordham Urban Law Journal) (warning of the potential consequences of making inadequate reforms to remedy the deficiencies identified in *Lopez Torres*: “[W]e must also vigilantly guard against the pendulum swinging too far in the direction of the status quo where constitutional rights are at stake . . . Let us also be careful not to let the overly-incremental become the ally of the unconstitutional”).

Brooklyn District Attorney Charles Hynes, the New York State Bar Association, and The Fund for Modern Courts all support appointive selection as a replacement for the system of judicial elections. See Celeste Katz, *DA’s New Judge-ment Call Justices Should Be Appointed: Hynes*, N.Y. DAILY NEWS, Jan. 26, 2005, at 3; Daniel Wise, *Hynes, Coalition Push for Appointment of Judges*, N.Y.L.J., Jan. 21, 2005, at 1; The Fund for Modern Courts, *About The Fund for Modern Courts*, http://www.moderncourts.org/About_Us/index.html (last visited Feb. 11, 2007) (“From the day of our founding, we have fought to remove the influence of money and politics from the selection process by working to institute merit selection.”). For the New York State Bar Association’s reports supporting appointive selection, see *infra* note 47. The fact

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against an effort “to make only small changes” and stated “[m]inor tinkering will not be enough to cure the constitutional flaws.”⁴⁴

3. *Designing the Alternative*

The symposium drew attention to the subject of appointive selection, a subject that has not been discussed recently on this scale.⁴⁵ To the extent that this reflects inattention, this may have resulted from scholarly indifference, pessimism, and an ill-founded belief that the answer is already known.⁴⁶ Bar associations, such as the American Bar Association, the New York State Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyers' Association, continued to recommend commission-based appointment systems through their publications or

that various organizations profess to support appointive selection does not necessarily mean that they support the same kind of appointive system or that each system is of equal quality or worthy of support.

44. *Breaking Down the Clubhouse*, *supra* note 17. Some have called for fundamental rather than incremental change. See Wise, *Second Circuit*, *supra* note 43 (quoting New York State Bar Association president Mark Alcott); Norman L. Greene, Letter to the Editor, *New York's Judge System*, N.Y. TIMES, Sept. 16, 2006, at A14 (recommending seeking “a well-designed appointive system to avoid having to reform the system repeatedly and in order to bring New Yorkers now the system that they deserve”). According to *Lopez Torres*, the convention system is unique to New York (and even within New York) for selecting judicial nominees and has poorly served New Yorkers. *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 215-16 (E.D.N.Y.), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). It is therefore unclear what may be gained by attempting to “improve” that flawed system (even if possible), rather than eliminating it and moving forward with more promising reforms.

Seeking inadequate judicial selection reforms where substantial changes are needed has been analogized to “putting lipstick on a pig.” Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 567 (2006).

45. The proper design of appointive systems has been the subject of recent articles, however, such as the author's articles for the *Mercer Law Review* and *Albany Law Review*. Norman L. Greene, *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949, 959 (2005) [hereinafter Greene, *Perspectives*]; Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 602 (2005) [hereinafter Greene, *Model Appointive Selection Plan*]. Professor Steven Zeidman, a symposium participant, also squarely addressed the design of appointive systems in Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 831 (2004) [hereinafter Zeidman, *To Elect*] (“What, then, should a model merit selection process look like? What are the component parts of an ideal system of merit selection?”).

46. See Greene, *Model Appointive Selection Plan*, *supra* note 45, at 607-08; see also Feerick, *supra* note 1, at 7 (commenting on the problem of pessimism). In addition, some have challenged the quality of certain appointment systems and argued that because there is no good or perfect system, attempts at change are futile. See Greene, *Perspectives*, *supra* note 45, at 961.

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reports.⁴⁷ Reformers might have from time to time articulated the word “appointments” as an alternative to elections and might have even mentioned the Missouri Plan and similar approaches.⁴⁸ But few were asking how one should design a good appointive system, let alone which were the best models to follow.⁴⁹

Although such plans were innovative and progressive when originally enacted, more may be done today than merely following the classic examples. Commission-based appointive plans were developed in the early part of the twentieth century and were most notably advocated by the American Judicature Society—one of the symposium’s sponsors—which became (and remains) one of the nation’s most prestigious court reform organizations. In 1940, the first plan was adopted in Missouri (and therefore called the Missouri Plan). It involved commission-based appointment of judges with a retention election at the conclusion of the judge’s term with the subject of the election being essentially one question: shall this judge be retained or not?⁵⁰ Commission-based plans were subse-

47. See, e.g., JUSTICE IN JEOPARDY, *supra* note 8; ACTION UNIT No. 4, N.Y. STATE BAR ASS’N, A MODEL PLAN FOR IMPLEMENTING THE NEW YORK STATE BAR ASSOCIATION’S PRINCIPLES FOR SELECTING JUDGES (1993), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Legislation/NYSBA_Model_Plan_for_selecting_judges.pdf (last visited Feb. 22, 2007); REPORT OF ACTION UNIT No. 4 (COURT REORGANIZATION) TO THE HOUSE OF DELEGATES ON TRIAL COURT MERGER AND JUDICIAL SELECTION (1979) (on file with Fordham Urban Law Journal); ROADMAP TO REFORM, *supra* note 37; *Task Force Recommendations*, *supra* note 13. ROADMAP TO REFORM was the product of the New York County Lawyers’ Association task force on judicial selection; the author was a member of the task force and co-chair of the subcommittee on appointive selection. Some members of the task force attended the symposium, and the report specifically acknowledged the work of symposium participant Jeffrey Jackson. See ROADMAP TO REFORM, *supra* note 37, at 7.

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48. For a summarized history of the development of appointive selection in the United States in the 20th century, including the Missouri Plan, see Caufield, *In the Wake of White*, *supra* note 19, at 627-28; see also Stempel, *supra* note 8, at 44 (“[E]lection of judges is not required by democratic theory, democratic norms, American History, or a functional analysis of judicial role. Appointment of the bench is thus perfectly consistent with both historical and modern democratic norms.”).

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49. Symposium sponsors—the American Judicature Society, The Fund for Modern Courts, and the League of Women Voters (through its Education Foundation)—and Pennsylvanians for Modern Courts have persisted with efforts in favor of commission-based appointments. One member of the American Judicature Society, Rachel Paine Caufield, and two members of Pennsylvanians for Modern Courts, Lynn Marks and Shira Goodman, participated in this symposium.

50. See Caufield, *In the Wake of White*, *supra* note 19, at 628 n.19 (“The merit selection plan is commonly referred to as the Missouri Plan because Missouri was the first to adopt the plan in 1940.”). Missouri nonetheless still elects some of its judges. *Id.*

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quently adopted in other states.⁵¹ Updates in those plans are needed, however, to reflect the passage of time, lessons learned from experience, and changes in values, including values favoring openness in government and diversity.⁵²

The use of the word “design” does not necessarily mean inventing new systems. Rather a state might adopt aspects of systems that are working well in other states. For example, system designers should know if New Mexico or Arizona has solved the problem of ensuring that diversity be considered in its system of judicial selection;⁵³ if Alaska has successfully addressed how to

51. See *id.* at 628 & n.23.

52. Many have historically called the commission-based system “merit selection.” Although some find value in the phrase, others have commented that it criticizes elected judges, unnecessarily so, as lacking in quality. Whether elected judges are more qualified than appointed judges is beyond the scope of this symposium. Resolving the quality issue for judges who are elected as opposed to appointed might require another symposium in order to determine what are the characteristics of judicial quality and how they apply to each individual judge. See Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 174 (2007) [hereinafter Caufield, *Best Practices*] (“[T]he claim that commission-based appointment produces the highest quality judges is notoriously difficult to evaluate because ‘quality’ is so ill-defined It is also worth noting that highly qualified candidates may prefer commission-based appointment because they are unwilling or unable to raise the money to run an effective campaign in an elective system.”); see also Jackson, *supra* note 34, at 126 (“Initially, there is the problem of reaching agreement on what attributes make someone a qualified judge. While it might be possible to agree on some general attributes, it is difficult to quantify them in any one individual”) (footnote omitted).

Shira Goodman and Lynn Marks argued for the continued use of the term “merit selection,” based in part on the positive reaction of Pennsylvania focus groups who find it appealing. See Shira J. Goodman & Lynn A. Marks, *A View from the Ground: A Reform Group’s Perspective on the Ongoing Effort to Achieve Merit Selection of Judges*, 34 FORDHAM URB. L.J. 425, 425 n.2 (2007). One may not lightly challenge their expertise on what is most likely to work in their state. But others (in New York, for example) have found the phrase offensive. New York reformers, attempting to build or advance a reform movement, may wish to alienate as few as possible. Supporters of appointive selection are sufficiently busy without fighting skirmishes over terminology. Reformers must select the terminology that they believe works best for them and be sensitive to cultural differences between states.

Nevertheless, others might contend that after the decision in *Lopez Torres*, the term “merit selection” should be reborn to describe a process where such political maneuvering is left behind. By any fair interpretation of the words, the system described in *Lopez Torres* seemed to be the opposite of “merit selection.” Rather, the controlling factor appeared to be the will of the political leadership who had their own political priorities in mind in seeking to determine the results of elections. See generally *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). This makes it perfectly understandable why some have wished to use the term “merit selection” to describe the alternative of selecting judges through appointments, rather than through elections.

53. See *infra* Section II.H.

avoid control of the judicial nominating commission by appointing authorities;⁵⁴ if Colorado or Arizona has determined how best to evaluate judges seeking reselection;⁵⁵ if Hawaii or the District of Columbia has a creative system for determining whether judges should be retained for another term which has been working well;⁵⁶ if Massachusetts has a good code of conduct for judicial nominating commissioners;⁵⁷ if another country requires certain education or testing before a judge is permitted to take office;⁵⁸ or if some proposal has been made that has a solution for providing oversight over judicial nominating commissioners or for preserving the independence of the commission.⁵⁹ The symposium may also result in identifying improvements which should be used for states with existing commission-based appointive plans, not just for states which elect judges.⁶⁰

Through research into the literature of judicial selection, personal experience, and contacts, I was able to recruit a distinguished faculty. Some were reformers already involved in designing appointive systems, others had addressed the subject in their scholarship, others were prepared to expand their studies, and still others even had direct experience with appointive selection in their own states.⁶¹ Some panelists were appointed as judges, others served on

54. *See infra* Section II.B.

55. *See infra* Section II.K.

56. *See infra* Section II.J.

57. *See* Mass. Exec. Order No. 470 (2006), available at [http://www.mass.gov/jnc/JNC%20-%20Executive%20Order%20470%20\(02.03.2006\).pdf](http://www.mass.gov/jnc/JNC%20-%20Executive%20Order%20470%20(02.03.2006).pdf).

58. *See infra* Section II.L.

59. One such proposal for preserving commission independence was contained in a 1989 bill, which was unsuccessful in Missouri but provides a useful model. That bill "would have prohibited the governor from communicating directly or indirectly with members of the nominating commission until the nominees for a judicial vacancy were submitted to the governor." Am. Judicature Soc'y, *Missouri Judicial Selection*, http://www.ajs.org/js/MO_history.htm (last visited Feb. 11, 2007). This proposal mirrors the author's recent proposal for limiting communication between the appointing authority and the commission. *See* Greene, *Perspectives*, *supra* note 45, at 964.

60. *See* Marilyn S. Kite, *Wyoming's Judicial Selection Process: Is It Getting the Job Done?*, 34 FORDHAM URB. L.J. 203, 204 (2007) (noting that the purpose of her symposium article "is to explain Wyoming's commission-based judicial selection process, study how it has performed over the years, see what lessons we can from that history, and consider how it can be improved").

61. One focus of Pennsylvanians for Modern Courts is the development and adoption of appointive selection plans, which the organization has studied in depth. *See* Pennsylvanians for Modern Courts, *Judicial Selection*, <http://www.pmconline.org/indexjs.htm> (last visited Feb. 11, 2007). Professor John Feerick, during his many years of involvement in judicial selection reform, chaired a commission that embraced appointive selection in the late 1980s, and outlined elements of a commission-based plan. *See* *Becoming a Judge*, *supra* note 10, at 293, 295-301. Moreover, Professor

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relevant judicial selection or evaluation commissions, and still others were keen observers of the process. The symposium included speakers from states including Arizona, Colorado, Kansas, Nebraska, New York, and Wyoming, where judges are appointed to full terms in some or all courts. Valuable experience is not limited to those from states where all judges are appointed to full terms, of course; even states which appoint judges only for vacancies may have such experience.⁶²

Finally, since this symposium focused on what makes a good appointive system, it avoided discussing whether contested elections are better than appointive systems or any flaws in elective systems.⁶³ In a sense, it was the reverse of a distinguished New York commission which considered how to improve judicial elections, and consistent with its limited mandate, did not consider appointments.⁶⁴ A number of panelists at the symposium, however, still covered retention elections, which often form a part of appointive systems.

II. THE SYMPOSIUM

In the following sections, I will attempt to bring together many of the important themes which were developed in the symposium. My reference points are the articles produced for the symposium.

A. The Importance of Judicial Appointments Throughout the United States

The subject of appointing judges and improving the way of doing so is important even where states elect judges. Although some states appoint all of their judges and some appoint only their appel-

Steven Zeidman addressed the precise subject of the symposium in a recent article. *See generally* Zeidman, *To Elect*, *supra* note 45. Through her connection with the American Judicature Society and her own scholarship, Rachel Paine Caufield has also long been involved with appointive systems. Of course, here our issue was not necessarily adopting any past models of appointive selection but improving them or creating new ones.

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62. Asking states that have used commission-based appointments about their own plans is eminently reasonable. The states that use commission-based appointments should be aware of what works well and what improvements and refinements are required. Moreover, even states with a widely-admired plan, such as Arizona and Colorado, can provide information on how a good plan can be made better.

63. This Article considers elections principally to provide context to the discussion of judicial selection by appointment. *See supra* Section I.B.

64. *See* FEERICK COMMISSION REPORT, *supra* note 15, at 11. An earlier commission chaired by Professor John Feerick studied judicial elections and, having a different mandate, recommended a commission-based appointment system to select judges. *See Becoming a Judge*, *supra* note 10, at 299-301.

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late judges, states that elect judges may still appoint them to fill vacancies. Filling vacancies is important, not only because these appointees often serve as judges for significant periods of time, but also because they run with the advantage of incumbency and may use that prestige to become elected.⁶⁵ One panelist commented that even in states where judges are elected, most “originally take the bench by appointment.”⁶⁶ Appointment is also the speediest way to fill vacancies and prevent disruption of court business.⁶⁷

B. The Principal Modes of Appointment

There are several common appointive systems, other than commission-based systems. First, there is direct appointment by a governor or by some other appointing authority, such as a legislature. Direct appointment means that the authority has a free hand to pick whoever it wants, subject to any legal experience or age requirements for judges. Sometimes the appointing authority uses a screening committee (such as in the designation of justices for the New York State Appellate Division by the governor),⁶⁸ sometimes the appointing authority does not.⁶⁹ The screening panel may advise the authority on who it views as qualified, but the authority need not select from the approved picks. “Absent a commission . . . appointing authorities may appoint individuals [to judge-ships] more for their politics than their ability [The appointing authority when a governor] particularly focus[es] on those who have helped the governor or the governor’s party or allies.”⁷⁰ Vir-

65. See Harrison et al., *supra* note 9, at 241, 258 (describing how incumbents have advantages over other challengers); see also Greene, *Governor’s Power*, *supra* note 7, at 52 n.41 (citing ARK. CODE ANN. § 16-13-104 (West 2005)) (restricting the ability of appointed judges to run as incumbents for certain judicial office while holding such office); Rob Moritz, *Bill on Judicial Elections Approved*, ARK. NEWS BUREAU, Mar. 19, 2005, available at <http://www.arkansasnews.com/archive/2005/03/19/News/318955.html> (discussing Arkansas bill prior to its passage).

66. Colquitt, *supra* note 6, at 77; accord Scheuerman, *supra* note 40, at 476.

67. Colquitt, *supra* note 6, at 77.

68. Greene, *Governor’s Power*, *supra* note 7, at 47 (discussing the Governor’s appointments of New York State Appellate Division justices and other judges and making suggestions for improvement in their selection process); see also Zeidman, *To Elect*, *supra* note 45, at 801 (describing the New York Governor’s use of screening commissions).

69. See Zeidman, *To Elect*, *supra* note 45, at 799 (“Executive appointment, whereby an elected official, typically the Governor, wields unfettered power with no formal input from any source, is . . . rare.”).

70. See Colquitt, *supra* note 6, at 77-78. The federal system involves direct presidential appointments and legislative confirmation, without a commission. The symposium, however, did not address reforming federal judicial selection.

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tually no reformer ever recommends a direct appointment system for state judiciaries.

The most commonly recommended reform involves the use of a judicial nominating commission, independent of the appointing authority, which recommends a small group of candidates from whom the appointing authority must select the judge. The commission has a screening function, but it also has a limiting function: the authority must select from the persons proposed by the judicial nominating commission.⁷¹ It may not request additional names, except in what one panelist called a “weak-commission” system;⁷² and it cannot select off the list.⁷³ Sometimes the authority selects some members of the nominating commission, although that is not typically recommended.⁷⁴ Where the appointing authority, such as a governor, selects commissioners, as one panelist noted, the system “reeks of redundancy and inefficiency” because “the governor actually controls the commission.”⁷⁵

71. See Zeidman, *To Elect*, *supra* note 45, at 799 (“The requirement that the appointment be made from the short list provided to the appointing authority is a distinguishing feature of a bona fide merit selection system.”). The system presumes that all of those listed by the judicial nominating commission are qualified, and it should not matter from the standpoint of quality who the appointing authority selects. See Harrison et al., *supra* note 9, at 252 (“Because the [judicial nominating commission] has completed an exhaustive inquiry, however, the governor presumably ‘can have a blindfold on, she could reach into the jar, and she could pull out a name, and whoever she pulls out would serve on the court ably.’”).

72. Colquitt, *supra* note 6, at 113. Professor Tarr noted that states might consider the federal appointment system which has no judicial nominating commission but requires senate confirmation; however, he did not necessarily advocate that they do so. See G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 *FORDHAM URB. L.J.* 291, 304-06 (2007).

73. Professor Tarr noted that Delaware’s judicial nominating commission may submit as few as three candidates to the governor but allows the governor to request another list of at least three names if she finds the first list unsatisfactory. Tarr, *supra* note 72, at 310. Delaware’s procedures were established by an Executive Order of the Governor. See Del. Exec. Order No. 4, *available at* http://www.state.de.us/governor/orders/eo_4.shtml#TopOfPage (last visited Feb. 11, 2007) (“The Governor may refuse to nominate a person from the list submitted and may require the Commission, within thirty days, to submit a supplementary list of no fewer than three other qualified persons willing to accept the office, subject to the same provisions governing the original list. The Governor may then nominate a person from the original or the supplementary list.”); see also Am. Judicature Soc’y, *Current Methods of Judicial Selection (Delaware)*, http://www.ajs.org/js/DE_methods.htm (last visited Feb. 11, 2007).

74. Greene, *Model Appointive Selection Plan*, *supra* note 45, at 605.

75. Colquitt, *supra* note 6, at 87. The governor’s selection of a substantial number of commissioners may create the impression, if not the fact, of the governor’s control. The danger may be lessened if there are structural safeguards to avoid such an appearance, such as limiting the number of selections by the governor, and restricting communications between the governor and the judicial nominating commissioners.

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Some have assumed that if a state wishes to adopt a commission-based appointive plan, there are a limited number of options from which to choose. As this symposium demonstrates, that assumption is wrong: "It is important to note that there is no one merit selection system."⁷⁶ According to one panelist, "there are nearly as many variations on the merit selection plan as there are states that use a commission-based appointment system."⁷⁷ Although commission-based plans have common elements,⁷⁸ the plans may involve multiple variations requiring important policy choices. Indeed, if someone advocates an appointive system without providing detail (and detail is the subject of the symposium), one may not be sure whether she should support the system⁷⁹ without more

See Greene, *Perspectives*, *supra* note 45, at 964; Am. Judicature Soc'y, *Missouri Judicial Selection*, http://www.ajs.org/js/MO_history.htm (last visited Feb. 11, 2007).

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76. Caufield, *Best Practices*, *supra* note 52, at 171.

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77. *Id.*

78. See *id.* ("What they all share, however, is the use of an independent (and usually bipartisan) commission that is established to evaluate applicants for the bench and make recommendations to the appointing authority."). Comparing all the existing and possible variations in the plans is beyond the scope of the Article. One consideration, however, is how much weight (if any) should be given by the judicial nominating commission to the appointing authority's predilections. Professor Tarr stated that the commission should consider the appointing authority's views. Tarr, *supra* note 72, at 302 ("[G]overnors tend to choose members of their own party as judges, so commissions should not send to them slates of potential candidates that include no members of the governor's party."). On the other hand, the Alaska Judicial Council states that the judicial nominating commission should not consider the likelihood of the applicant's appointment by the appointing authority. See Procedures for Nominating Judicial Candidates of Alaska Judicial Council, <http://www.ajc.state.ak.us/selection/procedur.htm> (last visited Feb. 11, 2007) ("The Council does not consider an applicant's likelihood of appointment by the governor.").

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The Alaska position appears to be correct. The purpose of the judicial nominating commission is to ensure that the best qualified candidates emerge as nominees, not those who are the most politically palatable to the governor. Considering the governor's preferences merely because they are her preferences would defeat at least one purpose of the commission. Furthermore, selecting the governor's known favorite would diminish the candidacies of the others and render them illusory, because they would never have had a realistic chance to be selected. This may also result in a drop in applications from candidates with strong credentials and who might make excellent judges, but have weak ties to the governor. To include the governor's favored candidates as a matter of policy, moreover, would create cynicism about the fairness of the process. See *Task Force Recommendations*, *supra* note 13, at 400.

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79. See Goodman & Marks, *supra* note 52, at 437. Shira Goodman and Lynn Marks noted:

Experts in polling, public research, and public relations advise reformers, such as [Pennsylvanians for Modern Courts], to talk generally about the need to employ a system that better assures qualified judges, to focus on the broader issues, and to avoid getting bogged down in the details and mechanics of how the merit selection system would operate. The problem is that

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information beyond the descriptive title.⁸⁰

C. The Need for Public Education on the Role of the Judiciary

The panelists agreed that education of the public on the role of judges is essential to the proper functioning of the judicial system. “[O]ur most important agent for change is education.”⁸¹ “[There is] widespread and basic misunderstanding about the role and function of judges in our society . . . [Some citizens] mistakenly believe that judges should be ideologically accountable to the electorate like members of the legislative and executive branches of government.”⁸² But judges are not supposed to decide cases to suit popular demand, but rather on the law, and this must be explained to

everyone . . . wants to know [for example] who will be appointing members of the nominating commission . . .

Id.

80. Many conversations or debates about appointment systems proceed without any description of which appointment system is at issue. For example, during a recent panel discussion on judicial independence and judicial selection, a co-panelist generally attacked “my appointive plans,” without explaining to the audience which plan he was attacking (presumably leaving that to the audience’s imagination) and without hearing my explanation of the plan. I replied that he did not know which appointive plan I was suggesting before he attacked it and there were a number of “appointive plans”—not just one.

81. Feerick, *supra* note 1, at 12.

82. Harrison et al., *supra* note 9, at 262; *see also* Hon. John F. Irwin & Daniel L. Real, *Enriching Judicial Independence: Seeking to Improve the Retention Vote Phase of an Appointive Selection System*, 34 *FORDHAM URB. L.J.* 453, 463-66 (2007). The importance of public education was also acknowledged by a group of chief justices. Mauro, *supra* note 9 (“The nation’s state chief justices are launching a campaign to remind voters of what used to be obvious: Judicial elections are different from those for other offices.”). A good example of this public understanding of judges as ordinary politicians appeared in a 2006 Montana ballot issue. A new provision would have instituted recall proceedings against a judge upon a petition, among other things, containing a statement alleging “electoral dissatisfaction”: “The justification statement is sufficient if it sets forth any reason acknowledging electoral dissatisfaction with a justice or judge notwithstanding good faith attempts to perform the duties of the office.” Mont. Const. Initiative No. 98 (seeking to amend MONT. CONST. art. VII, § 12(4)); *see also* Mont. Sec’y of State, *2006 Ballot Issues*, <http://sos.mt.gov/ELB/archives/2006/CI/CI-98.asp> (last visited Feb. 11, 2007). The ballot initiative was challenged in litigation and rejected by the courts. Chelsi Moy, *Judge Throws Out Ballot Initiatives*, *GREAT FALLS TRIB.*, Sept. 14, 2006, at 1A.

A Colorado ballot issue also proposed amending the Colorado Constitution to impose term limits for its judges. *See* Colo. Sec’y of State, *Proposed Initiative 2005-2006 #90*, <http://www.elections.colorado.gov/DDefault.aspx?tid=863&vmid=555> (last visited Feb. 11, 2007); *see also* Justice at Stake Campaign, *Colorado – Term Limits for Judges*, <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=3,570,857,858> (last visited Feb. 11, 2007) (offering additional background on the proposed Colorado amendment). The proposal was rejected by the voters. Howard Pankratz, *40: Caping Judges’ Tenure is Rejected*, *DENV. POST*, Nov. 8, 2006, at B3, available at http://www.denverpost.com/election/ci_4621511.

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the public.⁸³ School curricula should be changed to include judicial selection and emphasize the importance of an independent judiciary⁸⁴ to children at an early age.⁸⁵ One panelist recommended that public forums be conducted statewide on judicial impartiality, judicial selection, and judicial retention.⁸⁶ “Broader public knowledge of the role of the judiciary in enforcing individual constitutional rights would instill an understanding that, while a person may not agree with the result of any particular judicial decision, he or she can rest assured that the rule of law will always be applied.”⁸⁷

D. Selecting a Judicial Nominating Commission

Several panelists analyzed who should select the members of the judicial nominating commission, not just who the commissioners should be. The commissioners should be selected by multiple entities to help ensure “that no one individual has control over the commission or commissioners”⁸⁸; preferably, the appointing authority should not select commissioners.⁸⁹ Two panelists stressed that elected officials must be among the appointers, because their political support is essential for the plan to be adopted and they

83. Jackson, *supra* note 34, at 132-36.

84. Feerick, *supra* note 1, at 12.

85. See Harrison et al., *supra* note 9, at 262 (“Understanding this basic principle will require pedagogy which starts in primary school and continues through secondary school.”).

86. Irwin & Real, *supra* note 82, at 468-69.

87. Kite, *supra* note 60, at 232. In a speech at the Minnesota State Bar Convention, Minnesota Chief Justice Russell Anderson stated:

A 1999 survey showed that four out of ten Minnesotans claimed to know “little or nothing” about the courts. Clearly, we can do a better job in explaining how the judicial branch protects citizens’ rights and liberties, and how its nonmajoritarian structure is the genius of democratic design. One might not always agree with court decisions, but we should also be cognizant of the reality that if you regularly put the rule of law to a popular vote, it would cease to exist.

Anderson, *supra* note 20, at 23. Panelist Donald Burnett warned that there was a cancer in America assaulting our constitutional republic and the concept of judicial impartiality. Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 FORDHAM URB. L.J. 265, 265 (2007). Dean Burnett also noted that “powerful economic and political forces across the spectrum are now competing to control the composition of the courts, in order to create a judiciary aligned with their special interests.” *Id.*

88. Colquitt, *supra* note 6, at 91.

89. *Id.*; see also Burnett, *supra* note 87, at 283 (stating that “[a] nominating commission can be independent and perceived as independent . . . only if a majority of its membership is not determined by the judicial appointing authority or by any other single source”).

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“theoretically, are accountable to the public.”⁹⁰ One panelist noted the principle of legitimacy would suggest that a “majority of members [should] be appointed by persons [other than the ultimate appointing authority] with ties to the democratic process, rather than unelected special interests.”⁹¹ In this sense, legitimacy “refers to the confidence of the public that the initial [judicial] selection system itself comports with democratic principles.”⁹²

Others noted that non-elected officials must be among those appointing the commissioners so that the process neither is nor appears to be “totally controlled by politicians.”⁹³ But selecting the non-elected appointers may be particularly difficult, especially in determining which groups or organizations should be involved in the selection.⁹⁴ Two panelists referred to this problem as a “conundrum”⁹⁵ and a “dilemma.”⁹⁶ Although the panelists have not found a “magic formula,” they note that as they gather more information, they tweak their plan and try again.⁹⁷

Finally, the lawyer members of the judicial nominating commission should represent different legal specialties, and there should be party balance among them.⁹⁸ It is important to have lay members as well, because they “provide a valuable perspective on . . . the integrity and human character of the applicants . . .”⁹⁹ Otherwise stated, “some members of the nominating commission [must

90. Goodman & Marks, *supra* note 52, at 441.

91. Jackson, *supra* note 34, at 159.

92. *Id.* at 145; *see also* James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 537 (2003) (“Legitimate institutions are those with an authoritative mandate to render judgments [sic] for the polity.”).

93. Goodman & Marks, *supra* note 52, at 442 (explaining that the lack of a role for non-political parties may create the appearance of complete political control).

94. *Id.* at 444.

95. *Id.* at 445.

96. *Id.* at 439; *see also id.* at 437 (“The problem is that everyone—from elected officials to average people in focus groups—wants to know who will be appointing members of the nominating commission, or, more colloquially, ‘who picks the pickers.’”). If one focuses on the organization and procedures of the commission, however, how the commissioners get there may be less important. By way of analogy, it may be difficult to ensure that education in a classroom is effective if we simply hire a teacher for that classroom and tell her to do her best. It would likely be more constructive to give a teacher a curriculum to follow and monitor her and her students’ performance as well.

97. *Id.* at 447.

98. *See, e.g.,* Colquitt, *supra* note 6, at 95-98.

99. Jackson, *supra* note 34, at 152.

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be] regular folks—people who might end up in court as litigants, witnesses, or jurors”¹⁰⁰

E. Rules and Training of Judicial Nominating Commissions

Judicial nominating commissioners should be subject to rules and procedures,¹⁰¹ “[y]et little attention is paid to these rules and procedures, not only in academic studies of commissions, but in the statutory and constitutional language that creates commissions.”¹⁰² Specifically, there should be a published code of conduct for commissioners, transparency as to what the commissioners do to facilitate discovery of violations and enforcement of the code of conduct, and a means of enforcement against commissioners for disregard of the code, including removal.

“Some commissions have remarkably sophisticated rules, while others operate . . . with little to guide decision making processes.”¹⁰³ Some states have “[judicial] nominating procedures . . . that are often informal and vary considerably from one jurisdiction to the next.”¹⁰⁴ These states lack procedures, for example, on whether candidates should be interviewed, how many candidates should be interviewed and for how long, and what kinds of questions should be asked.¹⁰⁵ Such procedures are essential to the work of the commission, namely to “evaluate applicants and determine which applicants are best qualified”¹⁰⁶ and find that

100. Goodman & Marks, *supra* note 52, at 433.

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101. Colquitt, *supra* note 6, at 99 (noting that “any commission should operate under statutory directions, a code of conduct, and an oath” along with “a process for enforcing the statutes and code”).

102. Caufield, *Best Practices*, *supra* note 52, at 186. Professor Caufield added that some “commissioners make up the rules as they go.” *Id.*

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103. *Id.*

104. *Id.* at 182-83.

105. *Id.*; *see also generally id.* Steven Zeidman noted the problems of getting accurate information on candidates through interviewing other attorneys: “I came to realize that the legal community has its own pinstripe version of the police department’s oft-noted ‘blue wall of silence.’ It was extremely uncommon for anyone to have anything particularly critical to say. In short order I came to more fully appreciate the phrase ‘damning with faint praise.’” Zeidman, *Careful What You Wish For*, *supra* note 3, at 478.

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106. Caufield, *Best Practices*, *supra* note 52, at 190; *see also* Michael Sweeney, Panel 3 Remarks at the Fordham Law School Symposium: Rethinking Judicial Selection 64 (Apr. 7, 2006) (transcript on file with author) [hereinafter Sweeney, Panel 3 Remarks] (stating that “[e]veryone who enters the selection process must know the criteria by which they will be evaluated and they must know that everyone in the process will be evaluated by the same criteria”). Michael Sweeney is an Adjunct Professor at Fordham Law School and Legal Counsel to the New York State Commission to Promote Public Confidence in Judicial Elections.

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judge through active recruitment, not merely awaiting applications.¹⁰⁷

A related subject panelists considered was the importance of training judicial nominating commissioners and specifying their duties.¹⁰⁸ As one of the panelists noted, an “often overlooked question” is “How do the pickers pick?”¹⁰⁹ It is not enough to ensure the proper selection of commission members, but also to ensure the proper functioning of the commission. This is not a situation best left to chance or improvisation. “Good processes will yield good decision-making, and working to implement the best set of procedures will serve us well as an investment in the future of our state judiciaries.”¹¹⁰

F. Confidentiality of Commission Proceedings

The panelists also considered the extent to which proceedings of the commissions should be open. One goal should be to avoid secrecy and the ensuing public distrust of secret processes. “The

107. As Donald Burnett noted:

A commission should take steps to stimulate a broad array of applications, rather than merely accepting passively whatever applications may be received. Indeed, given the importance of judicial appointments, it may not be too much to suggest that nominating commissions should undertake professionalized search processes similar to those utilized by business organizations when hiring senior executives, or by academic institutions when hiring senior administrators and tenure-track faculty members.

Burnett, *supra* note 89, at 286.

Searches for potential judges already are occurring, however, in political circles and among interest groups, whenever judicial vacancies appear. Often, these searches are conducted quietly, but thoroughly, by persons or interest groups with a high stake in the outcome of judicial selections and a low regard for the value of an impartial judiciary. Ironically, the only stakeholders *not* engaged in active searches are likely to be the members of the bench and bar whose dominant interest *is* in an independent and impartial judiciary.

Id.

108. *See id.* at 285 (stating that members of nominating commissions should be trained on “fair evaluative processes and on clear criteria” for nominations); Kite, *supra* note 60, at 235 (“Furthermore, the effectiveness of the nominating commission could be increased by requiring formal training of new commission members.”); Zeidman, *Careful What You Wish For*, *supra* note 3, at 479 (noting that the “information-gathering techniques [needed by judicial nominating commissioners] require great training, skill, and time”); *see also* Caufield, *Best Practices*, *supra* note 52, at 181-82 (arguing that commission procedures and rules need to be thought about carefully).

109. Caufield, *Best Practices*, *supra* note 52, at 182.

110. *Id.* at 202; *see also* Burnett, *supra* note 89, at 287 (noting that a “neutral national organization” should develop “a list of best practices” for appointive systems, review the performance of appointive systems, publicize the quality of performance, and offer assistance to states where necessary).

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transparency of a system is important in garnering public trust for the eventual result.”¹¹¹ “Openness should bolster public support.”¹¹² A panelist questioned the secrecy of her own state system, noting “[t]he operation of the judicial nominating commission should be more open to the public.”¹¹³ “In the absence of information regarding proceedings, the public tends to think that the system is ‘closed,’ and that judges are selected through ‘the old-boy system’ or some other process that has little to do with the qualifications of the candidate.”¹¹⁴ Another cautioned against the problem of excessive openness driving away candidates and suggested that “[w]hile the discussions of the nominating commission should probably remain in confidence, the names of the finalists should be publicized.”¹¹⁵

111. Jackson, *supra* note 34, at 157.

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112. Colquitt, *supra* note 6, at 109 (“Open proceedings allow a greater opportunity for public input and enhance public confidence in the judicial selection system.”); *see also id.* at 112 (“[A]t the very minimum, the names of the potential nominees, limited biographical and professional information, and the final commission’s recommendations should be released to the public and the press.”).

113. Kite, *supra* note 60, at 234; *see also* Caufield, *Best Practices*, *supra* note 52, at 198-99 (“[C]ommissions with the discretion to craft their own rules will often opt to keep commission proceedings entirely confidential, thereby limiting public knowledge of the process and the applicants. This limits accountability and can undermine the public’s confidence in the process.”).

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Justice Kite elaborated on the concept of openness in her article:

[W]e should not, either as judges, attorneys, or judicial nominating commission members, fear sunshine in the process of selection of judges. If we want to guarantee the commission and the governor have the best possible information on potential nominees, we must allow the public to know who those nominees are and invite their input. Attorneys who express an interest in serving as a judge should not resist public scrutiny. This change would reduce wide-spread misconceptions about outside influences and biases in the selection of judges.

Kite, *supra* note 60, at 234 (footnote omitted).

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114. Jackson, *supra* note 34, at 157.

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115. *Id.* at 158.

There should also be transparency in the interview process, with the caveat that there may be some tension at this stage between advancing the public’s knowledge of the candidates and attracting quality candidates. While transparency would appear to suggest that interviews with the candidates be made publicly available, [others point] out that to do so may inhibit the effectiveness of the interviews. [They argue] that the commission should have the ability to ask “hard questions,” which might cause problems for the commissioners or the candidates if made public.

Id.

G. Review and Oversight for Commission Proceedings

A review process for judicial nominating commissions should be established to ensure the fair operation of those commissions.¹¹⁶ In her analysis of the English appointive system, one panelist described an “independent watchdog entity, auditing the appointment process and investigating complaints about process and fairness issues arising in specific appointments” and a successor agency with a similar function.¹¹⁷ “[A]ny commission should operate under statutory directions, a code of conduct, and an oath.”¹¹⁸ Commissioners who violate the rules should be disciplined “through an enforcement process.”¹¹⁹

The concept of oversight for the commission is natural to our system. The approach is essentially one of checks and balances. A judge’s decision is subject to review by another court, and if the state has a two-level appellate structure, that court may be reviewed by still a higher appellate court. Sometimes, there may be additional federal court reviews. We cannot be sure which court made the correct decision, but our system trusts the safeguards of hierarchical review, with one entity having the final word.

H. Diversity in Appointment Systems

The panelists recognized the importance of fostering diversity in the appointive system. “For an appointive system to be perceived as legitimate, it must ensure that diversity is considered in nominating candidates and in appointing judges.”¹²⁰ One panelist recommended having a constitutional or statutory provision which mandates that diversity be considered by the judicial nominating commission.¹²¹ In order to maximize diversity in judicial appoint-

116. For suggestions of the safety valve of a judicial nominating review commission to provide oversight over the judicial nominating commissions, see Greene, *Perspectives*, *supra* note 45, at 968, and Greene, *Model Appointive Selection Plan*, *supra* note 45, at 604.

117. Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 *FORDHAM URB. L.J.* 387, 405 (2007).

118. Colquitt, *supra* note 6, at 99.

119. *Id.* at 101.

120. Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 *FORDHAM URB. L.J.* 485, 485 (2007).

121. *Id.* at 487 (“Ensuring diversity is most likely to occur when the law establishing the appointive system, whether in a constitution or statute, includes language that mandates consideration of diversity.”). Professor Romero suggested three ways to ensure diversity:

[First, d]iversity language in constitutional provisions, legislation, or executive orders has the effect of valuing diversity and giving it the legal stamp of approval.

ments, however, one must also address the lack of diversity in the profession. “Efforts to diversify the bar are essential to diversifying the bench, because the bar is the pool from which we select judges.”¹²² Another panelist noted that “diversity must be defined.”¹²³ Choices include gender or racial diversity only, or “other demographic, political, socioeconomic, geographic, or professional differentiations.”¹²⁴

Efforts at achieving diversity should also be measured.¹²⁵ “The nominating commission should also be directed to keep records regarding the diversity of its applicants, not only on the basis of race or gender, but also on the basis of religion, background, geography, and type of practice.”¹²⁶

I. The Role of Judicial Discipline in Judicial Selection

A panelist explained the important role judicial discipline commissions might play in judicial selection and the obstacles to their

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A second way to ensure diversity, apart from constitutional and legislative mandates or executive orders, would be to adopt rules of procedure that enhance the selection of women and minorities to the nominating commissions and increase the number of applicants from minority groups and women.

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[Third], a conscientious commission and conscientious chair can implement informal practices that further diversity.

Id. at 487-99; accord Jackson, *supra* note 34, at 141-45.

Arizona requires consideration of diversity for nominating commission members and judicial nominees. See Harrison et al., *supra* note 9, at 245.

122. Sweeney, Panel 3 Remarks, *supra* note 106, at 60.

123. Colquitt, *supra* note 6, at 96.

124. *Id.*; see also Kite, *supra* note 60, at 221 (commenting that diversity includes variations in professional experience of candidates). Justice Kite mentioned a Wyoming poll in which some respondents were concerned that the judicial selection process in Wyoming preferred attorneys with careers in private practice over government attorneys. See Kite, *supra* note 60, at 221-22. Whether or not the Wyoming poll is valid, those concerned with optimum appointment systems need to be aware of how to avoid biases against or in favor of any particular professional group.

125. Romero, *supra* note 120, at 496-97 (“Each commission should be required by rule to keep records regarding the gender, race, and ethnic status of the commission members, applicants for judicial positions, nominees, and judges appointed by the governor.”).

[A] transparent process with required reporting of statistics regarding the number of women and minorities on commissions, in the applicant pool, and on the list of nominees provides a basis for measuring how well the appointive system has achieved diversity.

Id. at 497.

126. Jackson, *supra* note 34, at 160.

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playing such a role.¹²⁷ For example, some judicial discipline is confidential, and confidential information may not be provided to appointing authorities absent a waiver of confidentiality by the candidate. Yet disciplinary information is precisely the type of information that a governor or other appointing authority should have. “Should not a governor [know] that a particular candidate for judicial office had been issued three or four private reprimands by an attorney or judicial disciplinary body?”¹²⁸ The candidate may refuse to provide a waiver, but according to a panelist, she probably would not be appointed or rated qualified by a bar association, even though voters in an elective system might still elect her.¹²⁹

J. The Reselection of Judges in Appointment Systems

Any judicial selection system—other than one with a single non-renewable term which would certainly remove incentives to “curry favor with those who control [judges’] continuation in office”¹³⁰—must provide for reselection of the judges. Appointment systems have two common forms of reselection: retention elections and commission-based reappointments (where a commission does the reappointing). None of the panelists fully addressed commission-based reappointments.¹³¹

In the New York Court of Appeals model, a judge whose term is expiring applies to the judicial nominating commission for reap-

127. Judicial discipline as well as judicial performance evaluations are important parts of an appointive selection plan. See Colo. Judicial Branch, *Merit Selection of Judges to Mark 40-year Anniversary in Colorado* (Apr. 24, 2006), available at <http://www.coloradojudicialinstitute.org/downloads/40th%20Anniversary%20Jud%20Dept%20PR.pdf> (“The merit selection process as it now exists has three important components. The first establishes a nominating commission The second component of merit selection is the Judicial Discipline Commission that oversees the conduct of judges. . . . The third component of merit selection is the evaluation of judges.”).

128. Robert H. Tembeckjian, *A Role for Disciplinary Agencies in the Judicial Selection Process*, 34 *FORDHAM URB. L.J.* 501, 504 (2007).

129. *Id.* at 508.

130. Tarr, *supra* note 72, at 311 (noting that the American Bar Association report, *Justice in Jeopardy*, endorsed single terms and that European constitutional courts use them).

131. But see Jean E. Dubofsky, *Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability*, 34 *FORDHAM URB. L.J.* 315, 315 (2007) (arguing that a “performance commission might serve as a substitute for retention elections,” but noting it is unlikely that “periodic commission review” will replace retention elections in Colorado).

pointment.¹³² The judge has no advantage of incumbency, and even if her performance was outstanding (however determined), the commission will still report out multiple candidates' names from which the governor must select.¹³³ The question is not whether the incumbent did a good job, but whether the commission wishes to propose her name to the governor and the governor chooses to select her. Thus in 2006, New York Court of Appeals Judge George Bundy Smith was not reselected by Governor George Pataki, who had the right to select any of seven nominees (including Judge Smith) for the Court of Appeals.¹³⁴ Instead, Governor Pataki selected Appellate Division, Fourth Department presiding justice Eugene F. Pigott, Jr.¹³⁵

132. N.Y. CONST. art. VI, §2(c), (e); N.Y. Judiciary Law § 63(2)(b) (2006); *see also* Am. Judicature Soc'y, *Current Methods of Judicial Selection – New York*, http://www.ajs.org/js/NY_methods.htm (last visited Feb. 11, 2007).

133. N.Y. Judiciary Law § 63(3) (requiring that the report on the nominees be "re-leased to the public by the [judicial nominating commission] at the time it is submitted to the governor"); Am. Judicature Soc'y, *Judicial Merit Selection: Current Status* (2003), <http://www.ajs.org/js/JudicialMeritCharts.pdf> (indicating that three to seven names are submitted and that the names are made public).

134. In an ominous comment, a *New York Times* reporter stated that "several legal experts said that [Judge Smith's] prospects were harmed because of the decision he wrote in 2004 striking down the state's death penalty, angering the governor." Michael Cooper, *With New Pick Pataki Puts Mark on Highest Court*, N.Y. TIMES, Aug. 19, 2006, at A1. If Judge Smith was "punished" for a death penalty decision by Governor Pataki as indicated in the article, doing so would have contravened basic principles of judicial independence.

135. *Id.* Judge George Bundy Smith was appointed by Democratic Governor Mario Cuomo. *See* Hon. George Bundy Smith – Biography, <http://www.courts.state.ny.us/ctapps/gbs.htm> (last visited Feb. 11, 2007). His fourteen-year term was set to expire in September 2006, and he faced mandatory retirement at age seventy at the end of December 2007. Born in 1937, at the time he sought to be reappointed, he was sixty-nine years old and could have served only one more year if he were given a new term. *See* Cooper, *supra* note 134, at A1. Governor Pataki reportedly said that he did not reappoint Judge Smith for that reason. The reappointment of Judge Smith would have given the Governor's successor, rather than Governor Pataki (since he did not seek reelection in 2006), a chance to appoint Judge Smith's replacement. *See id.* Although one might argue that Governor Pataki's decision was reasonable, because Judge Smith could only have served through 2007, this same problem could have developed if the incumbent had many more years to serve before retirement. Specifically, under the New York system, the governor may unilaterally decline to appoint an incumbent judge of a different party regardless of how many more years the judge has to serve. *See* N.Y. CONST. art. VI, § 2(c), (e); N.Y. Judiciary Law § 63(2)(b); Am. Judicature Soc'y, *Current Methods of Judicial Selection – New York*, *supra* note 132.

In contrast, if Judge Smith had been up for reappointment in a state with an incumbent advantage (for instance, states with retention elections, such as Colorado or Arizona, or states with types of commission-based reappointments unlike New York, such as Hawaii or the District of Columbia), he may well have had a greater chance at reselection. *See infra* notes 136-38. He would not have faced the problem of needing

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In Hawaii, a judge returns to the judicial selection commission, which decides whether the judge should be retained.¹³⁶ This leaves the incumbent with some benefit of incumbency since the decision over her retention is without reference to other applicants.¹³⁷ The District of Columbia also uses commission-based reappointment,

to be reappointed by a governor of a different party than the one who originally appointed him from a number of equally situated applicants.

This raises questions: why was no incumbent advantage built into the New York system, and what, if anything, should be done now to correct this? Should the New York system now be viewed as one term of fourteen years, which is difficult to renew regardless of the performance of the judge? *See generally* Hon. Stewart F. Hancock, Jr., Letter to the Editor, *Pataki Should Reappoint Smith to Appeals Court*, THE POST STANDARD (Syracuse, N.Y.), Aug. 4, 2006, available at <http://www.syracuse.com/printer/printer.ssf?/base/opinion-1/1154682410165480.xml&coll=1> (requesting reappointment of George Bundy Smith because of his quality and judicial independence, and suggesting the adoption of presumptive reappointment). The author of the letter, himself a former New York Court of Appeals judge, asked:

[W]hen the judge has performed his or her judicial duties during the 14-year term in an exemplary manner, should there not be a presumption that the judge will be reappointed? One may well ask: Why should not such a judge be favored for reappointment over others who have had no experience at all on the court?

Id. The letter was co-signed by several distinguished New York attorneys, including Professor John Feerick. The use of the phrase “performed . . . in an exemplary manner” is important, since no one should continue as an incumbent if he or she has performed poorly.

The New York County Lawyers’ Association model plan has recommended that:

[R]eappointment of judges should be entirely determined by the judicial selection panels [i.e., judicial nominating commissions] based on a review of the judge’s performance on the bench, with no role for the elected appointing authority [T]his procedure essentially establishes a presumption of continuation in office for a judge whose performance has met the panel’s criteria.

ROADMAP TO REFORM, *supra* note 37, at 11.

136. *See* HAW. CONST. art. VI, § 3; Am. Judicature Soc’y, *Current Methods of Judicial Selection - Hawaii*, http://www.ajs.org/js/HI_methods.htm (last visited Feb. 11, 2007). In Hawaii,

[j]udges must notify the commission within six months of the expiration of their term that they plan to seek retention. The commission solicits public comment and interviews those who have had contact with the judge. The judge completes a questionnaire and is interviewed by the full commission.

A judge must receive at least five favorable votes to be retained.

Am. Judicature Soc’y, *Current Methods of Judicial Selection - Hawaii*, *supra*; *see also* Lawrence S. Okinaga, *Judicial Selection in Hawaii*, HAW. B.J., July 10, 2006, at 100 (noting that Hawaii varies from other jurisdictions in that it not only selects, but also retains, its judges through appointment by commission; in most other states, appointed judges renew their terms by running in retention elections unopposed).

137. One panelist, however, would not provide a benefit to incumbent judges, stating that,

Given the crucial nature of the judicial function, the ultimate question must be whether there is anyone in the pool of available applicants who might perform better [The question] sets an appropriately high standard for

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with some advantage of incumbency as well. The judge is evaluated by the Judicial Disabilities and Tenure Commission. There are three rating options—unqualified, qualified, or well-qualified. The judge rated unqualified is not retained; the judge rated well-qualified is retained; and if the judge is rated qualified, the President of the United States (the appointing authority) has the choice whether or not to reappoint the judge.¹³⁸

The symposium principally focused on retention elections, since the panelists from appointive selection states who covered the subject also had retention elections, specifically Arizona, Colorado, Kansas, Nebraska, and Wyoming. The emphasis was on how those retention elections functioned and how might they be improved. Problems include low voter participation and lack of voter knowledge of judicial performance.¹³⁹ Significant percentages of voters may be counted on to vote yes or no without any legitimate reason for doing so, regardless of the performance of the judge standing for retention.¹⁴⁰

Improving voter knowledge is hampered by lack of available information about the judges seeking retention. Information made available to the public should be “quality information, addressing as many aspects of judicial performance as possible in as much detail as possible.”¹⁴¹ A judge should be evaluated not merely on her competence but on her temperament. “Judicial performance entails both ‘competent’ discharge of judicial duties and ‘temperate’ discharge of judicial duties.”¹⁴²

Retention elections also may occasionally be used by “special interest groups . . . to further political agendas” when they are unhappy with court decisions.¹⁴³ An antidote might be “greater [public] understanding of the importance of an independent judici-

such an important job, and signals . . . that we take seriously our obligation to devise a system that produces only the best and brightest.
Zeidman, *Careful What You Wish For*, *supra* note 3, at 484.

138. D.C. CODE § 1-204.33(c) (2006); *see also* Am. Judicature Soc’y, *Current Methods of Judicial Selection - District of Columbia*, http://www.ajs.org/js/DC_methods.htm (last visited Feb. 11, 2007).

139. *See* Kite, *supra* note 60, at 218.

140. *See* Irwin & Real, *supra* note 82, at 462.

141. *Id.* at 471. Justice Kite described Wyoming’s judicial evaluation poll as providing “some information about judges standing for retention,” but questioned the poll’s reliability. Kite, *supra* note 60, at 218.

142. Irwin & Real, *supra* note 82, at 460.

143. *Id.* at 465 (discussing the case of former Nebraska Supreme Court Justice David Lanphier, who was not retained); *see also* Tarr, *supra* note 72, at 313 (noting that retention elections can share the “worst features of partisan elections,” but incumbents are usually retained and “politicization is episodic”).

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ary which enforces the rule of law,” reducing the “chance of public retaliation for unpopular decisions.”¹⁴⁴

K. Judicial Performance Evaluations in Appointive Systems

“To enhance accountability, the system should have a mechanism for independent evaluation of the judge’s performance, and the public should be informed of the evaluation in advance of the retention decision.”¹⁴⁵ Sophisticated performance evaluation systems for judges standing for retention were recommended, such as those used in Colorado,¹⁴⁶ Arizona,¹⁴⁷ and other states.¹⁴⁸ Improvements may still be made. For example, Colorado’s judicial discipline commission has not been sharing information with the state’s judicial performance evaluation commission.¹⁴⁹ This deprives the evaluation commission of potentially crucial information for its findings. Few judges in Colorado receive “do not retain” evaluations, and of those, only some are rejected by the voters.¹⁵⁰ The same is true for Arizona, although some have retired rather

144. Kite, *supra* note 60, at 232.

145. Jackson, *supra* note 34, at 160.

146. For the description of the Colorado judicial performance program, see <http://www.cojudicialperformance.com> (last visited Feb. 11, 2007).

147. Arizona’s judicial performance review is required by its constitution, and it is the only state with a constitutional mandate for such review. ARIZ. CONST. art. VI, § 42; Harrison et al., *supra* note 9, at 245; Am. Judicature Soc’y, *Current Methods of Judicial Selection - Arizona*, http://www.ajs.org/js/AZ_methods.htm (last visited Feb. 11, 2007).

148. Irwin & Real, *supra* note 82, at 470; Kite, *supra* note 60, at 236. Jean Dubofsky called Colorado’s system “the most sophisticated method in the nation for providing information to voters in judicial retention elections.” Dubofsky, *supra* note 131, at 315. See also Harrison et al., *supra* note 9, at 253 (“[T]he [Arizona Judicial Performance Review] Commission surveys virtually everyone who has interacted with the judge in his or her duties, including lawyers and judges’ staff, and, where applicable, litigants, jurors, and witnesses. . . . [T]he [Judicial Performance Review] Commission gathers a wealth of pertinent information”); *id.* at 256 (“[T]he judicial performance review process is an ongoing and searching inquiry that rates the judge on virtually all of his or her courtroom-related interactions.”). Alan Tarr commented that “[w]hichever system of reselection is employed,” a commission should “evaluate the performance of incumbents while in office and . . . recommend for or against retention.” Tarr, *supra* note 72, at 313. See generally The Nat’l Ctr. for State Courts, <http://www.ncsconline.org/wc/CourTopics/statelinks.asp?id=46&topic=JudPer> (last visited Feb. 11, 2007) (list of and links to state judicial performance evaluation programs).

149. See Dubofsky, *supra* note 131, at 334.

150. *Id.* at 338. If, however, the initial appointive system works well in selecting quality judges, few might be expected to be rejected. *Id.* To the same effect, see Harrison et al., *supra* note 9, at 258 & n.131 (regarding Arizona’s appointive selection system).

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than seek retention in light of their poor evaluations.¹⁵¹ Arizona voters likewise rarely vote not to retain a judge.¹⁵²

Besides providing guidance for voters, judicial performance evaluation may also provide helpful feedback to a judge on her own performance. Colorado is about to commence interim evaluations to provide judges with such information.¹⁵³ Arizona already does the same.¹⁵⁴

L. Pre-Judicial Education—European Models

Some panelists considered the importance of education of judicial aspirants before they become judges. One stated that we should consider “educational programs and credentialing systems for judicial aspirants” or an “internship model” common for doctors.¹⁵⁵ Another noted the emphasis on pre-judicial training such as in the Netherlands and other civil law countries. For example, in the Netherlands, one of two routes to the judiciary involves a six-year program of judicial studies after a law degree, with an internship in various legal entities such as law firms, followed by an examination and psychological testing and assessment.¹⁵⁶

151. See Harrison et al., *supra* note 9, at 257-58.

152. See *id.* at 258.

153. See Dubofsky, *supra* note 131, at 336.

154. See Harrison et al., *supra* note 9, at 255.

[J]udges receive individualized evaluations through conference teams. . . . [T]he teams meet with each judge annually and review his or her survey results and self-evaluation. The judge and team develop a self-improvement plan for the judge. . . . Judges agree that this process is invaluable to the improvement of their judicial performance. Few, if any, elected officials in Arizona receive anything close to this type of tailored performance evaluation

Id. (footnotes omitted).

155. Luke Bierman, *Help Wanted: Is There a Better Way to Select Judges?* 34 FORDHAM URB. L.J. 511, 524-25 (2007); see also Zeidman, *Careful What You Wish For*, *supra* note 3, at 481-82 (suggesting “pre-judicial training, education, and certification,” perhaps a “judicial studies graduate school,” and noting “training programs for judicial aspirants” in other countries).

156. See Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363, 374 (2007) (discussing training in civil law systems). The civil service model typically lacks prestige, and judges without practical experience may lack “sympathy” for what is involved in running a law practice. *Id.* at 376. The choice need not be between pre-judicial education and lack of experience, however. In a model appointive selection system, commissions may seek out and approve candidates with both education and experience.

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M. Empirical Research on Appointive Systems

One panelist analyzed numerous court opinions in order to attempt to reach a conclusion on what type of appointive selection system produces judges whose decisions exhibit the greatest degree of judicial independence.¹⁵⁷ He focused on criminal appeals and, in particular, the extent to which the courts support the state in criminal cases. His assumption was that a pro-defendant decision (therefore a less popular decision) is indicative of judicial independence and the reverse is not.¹⁵⁸ “Although many other factors can lead to the removal of a judge, a reputation for being ‘soft’ on criminal defendants carries well-documented negative repercussions.”¹⁵⁹ “If a court’s judges are not concerned with the opinions of those who could remove them from office, the hallmark of an independent court, arguably that court should be more prone to issue unpopular decisions, assuming all other factors are equal.”¹⁶⁰

The panelist attempted to correlate the criminal justice decisions that he studied with the manner in which judges were reselected after the expiration of their terms. He then sought to determine whether systems with different reselection methods resulted in decisions which reflected a greater or lesser degree of judicial independence. He recommended that additional research be performed, which should use

analysis techniques to isolate the effects that these features might have on how courts decide cases by controlling for other factors that might affect the outcome of a case (such factors include the overall ideological complexion of the court, the facts and the law at issue in the case, and the crime rate in the state).¹⁶¹

Although the results of the research were not conclusive, one goal of the symposium was to stimulate additional research—not just to come up with answers.

Maximizing judicial independence may be only one of several goals that we wish to achieve. As a panelist noted, despite the need for some independence, “the system should contain enough

157. Aman L. McLeod, *A Comparison of the Criminal Appellate Decisions of Appointed State Supreme Courts: Insights, Questions, and Implications for Judicial Independence*, 34 *FORDHAM URB. L.J.* 343 (2007).

158. *See id.* at 348.

159. *Id.* at 349.

160. *Id.* at 348.

161. *Id.* at 362. Professor McLeod found some of his results to date “counterintuitive” and “startling,” and rather than summarize them here, it would be best to review his study in its entirety. *Id.* at 356.

accountability that judges may be removed if their behavior in office demonstrates bias, a conscious disregard of the requirements of the law, a lack of diligence, or a lack of civility.”¹⁶²

CONCLUSION

The symposium focused on building a good system for selecting judges; getting scholars and others with practical experience to talk about what constitutes a good system; and stimulating research, scholarship, and future symposia on the subject. The goal is to develop the best appointive system that may be designed. A state wishing to adopt an appointive plan need not resign itself to a plan in effect in any particular state. Instead, it may prefer to select the plan to which that particular state aspires. In addition, according to two panelists, “[a] model merit selection plan is a good place to start, but . . . [e]ach model must be adapted . . . so that it fits the state or locality to which it will be applied.”¹⁶³

The symposium also considered gathering support for the appointment process. One panelist devoted a section of his article to “Selling the Appointing Process,” regarding obtaining public support for a change from elections to appointments.¹⁶⁴ Another mentioned attempts to undermine the appointive process in his state and considered ways to preserve and defend the appointive system.¹⁶⁵ As one contributor to this symposium noted, “[r]eformers need to engage their opponents and present reasoned arguments in support of appointment.”¹⁶⁶ Even beyond reasoned arguments, however, supporters of appointments need to have good models to demonstrate affirmatively what they propose, and this symposium

162. Jackson, *supra* note 34, at 136.

163. Goodman & Marks, *supra* note 52, at 451; *see also id.* at 451-52 (noting the need to learn more about the “cultural and political realities of the jurisdictions in question” and that “[t]his learning process informs the development and revision of merit selection proposals”).

164. Colquitt, *supra* note 6, at 122. Political leadership seeking reform may also play a role. *See* Feerick, *supra* note 1, at 9 (recounting the New York Court of Appeals appointive selection plan developed in the 1970s: “In my opinion, the catalyst for change was the governor at the time, Hugh Carey, who, in his campaign to be governor, said to Cyrus Vance and other leaders of the bar that, if elected, he would give strong leadership to change in the system. He delivered on his promise.”).

165. *See* Harrison et al., *supra* note 9, at 250 (“The efforts to undermine or eliminate the appointive system continue unabated in Arizona because special interests have apparently concluded that those interests are not best served by independent, impartial judges.”). The authors suggest methods to support appointive selection in Arizona, including providing more information to the public on the operation of the nomination process and judicial performance review. *Id.* at 251-54.

166. Tarr, *supra* note 72, at 294.

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provided an opportunity to analyze and construct them. As a contributor commented in an understatement, “regardless of one’s ultimate views on the merits of appointment versus election, [this] Symposium is certainly timely.”¹⁶⁷

SYMPOSIUM ACKNOWLEDGMENTS

As the organizer of this symposium, I recognize how much the symposium owes to the following:

— Each of my panelists. A new faculty was created who may well be in demand for future programs. Those readers who were at the program or saw the symposium on video will recognize their wit and brilliance. They will see it again in the articles in this symposium issue.

— As the funders of a symposium with many out-of-state speakers, Carnegie Corporation of New York and the Open Society Institute acknowledged the importance of the symposium and lent their prestige and essential support. They also helped make this symposium even better by ensuring that it was well-planned and executed to develop new ideas.

— Fordham Law School; and, in particular, Dean William Treanor; Professor John Feerick, whose eloquent presentation at the symposium typifies why he has been and continues to be a role model and mentor for many reformers; The Louis Stein Center for Law and Ethics at Fordham Law School, which sponsored the symposium, and its director Professor Bruce A. Green, for his counsel and support throughout; and Fordham’s excellent conference staff, including Director of Academic Programs and Continuing Legal Education Helen Herman, and Assistant Director Darin Neely, together with David Quiles, Angela Belsole, and Fordham’s communications department.

— The Fordham Urban Law Journal for agreeing to publish the many articles from the symposium in a special issue and for the assistance of its editors, including Vivian Lam, editor-in-chief, Kimberlee Tangorra, managing editor, and my articles editor, Genevieve Blake. Based upon much experience in producing symposia, I am well aware that it is often the publication that lasts.

— My other sponsors, who have long been dedicated to the improvement of American democracy and believed in this project, including the American Judicature Society (Rachel Paine Caulfield), the League of Women Voters of New York State Education

167. *Id.*

Foundation (then Executive Director Rob Marchiony and Lenore Banks), the Constitution Project (Virginia Sloan and Kathryn Monroe), and The Fund for Modern Courts (Victor Kovner and Dennis Hawkins).

— John Caher, who until recently led the Albany Bureau of the *New York Law Journal*, and who has left for a position in Governor Spitzer's administration. His articles on judicial selection appeared regularly in the *Law Journal*, and for anyone who wanted to know what was happening in the field, his articles were compulsory reading.

— Those who attended the symposium, including the sizeable number who came from outside New York State.

Finally, I would like to recognize all those who understand the importance to our democracy of justice, impartiality, and the rule of law.